NOTES

NECESSITY AS A DEFENSE.—The recent case of *State of Arizona* v. *H. E. Wootton*,[1] arising out of the "Bisbee deportations", introduces necessity as a defense to a criminal charge. The defense involves questions of novelty due to the rare occasions on which it is used. The defendant was charged with kidnapping one Fred W. Brown. The indictment was based on the statute of Arizona providing that: "Every person who forcibly steals, takes or arrests any person in this state and carries him into another country, state or county . . . is guilty of kidnapping."[2] The purpose of such taking is entirely immaterial.[3] The Warren District, in which the act complained of took place, was one of the greatest copper producing districts in the world. The population of the district were either directly employed at the mines or were substantially dependent upon their continued operation for support. The defendant, one of a great number of specially appointed deputy sheriffs with whom he acted in concert, took Fred W. Brown, one of about a thousand strikers, their sympathizers, members of the Industrial Workers of the World and others, from his home to the Warren Ball Park, thence onto freight cars, transporting them into New Mexico where they were turned over to the military authorities at Columbus.

While not contending that his act was one which fell outside the statute, the defendant maintained that he was excused from the consequences on the grounds of (1) self-defense; and (2) necessity arising out of the following state of facts which he offered to prove: Prior to the deportations, an elaborate conspiracy had been entered into for the destruction of the right of private property, and of the government of the United States, and for the disorganization of the lumber and copper industries by strikes accompanied with violence. Such a strike had been called in the Warren District and, at the time of the deportations, the conspirators had large quantities of fire-arms and ammunition which were concealed in the district. It was the purpose of the conspirators to destroy lives and property other than their own on the 12th of July, 1917, and on the night preceding, one of the strike committeemen informed the then sheriff of Cochise County, which included the Warren District, that he would no longer be responsible for the acts of such persons as contemplated the destruction of lives and property. The sheriff tried to procure aid from the Federal and State authorities, but no troops were furnished and no other form of aid supplied. The sheriff and his deputies thereupon decided to remove the conspirators from the district and turn them over to the military authorities at Columbus, N. M.

The prosecution resisted the admission of the testimony on the ground that, if it were proved, no defense in law would be established. Pattee, J., who presided at the trial, ruled that the facts would not constitute self-defense because there was lacking the fact that Brown had committed hostile acts or demonstrations. For the rule of self-defense to be invoked, there must be more than fear of violence even though that fear be induced by threats. He also ruled out that portion of the testimony relating to the general conspiracy

[1] (Ariz. 1920) 6 Journal Amer. Bar Assn. 99.
[2] Ariz. Penal Code (1913) § 185.
[3] For the construction of similar statutes see State *v.* Backarow (1886) 38 La. Ann. 316; John *v.* State (1896) 6 Wyo. 203, 216, 44 Pac. 51.

to do away with the right of private property and with the Government of the United States; but admitted the rest of the testimony on the ground that from it the jury would be warranted in finding that the defendant acted from such necessity as would excuse his acts. The court was therefore forced to distinguish self-defense from necessity, which it did by quoting: "'The distinction between necessity and self-defense consists principally in the fact that while self-defense excuses the repulse of a wrong, necessity justifies the invasion of a right.'"[4]

The cases cited by the court as illustrating the law of necessity are mainly cases involving the invasion of the right of one who was not in any way the cause of the conditions from which the necessity arose.[5] From the class of cases which the court analyzed as explaining the doctrine of necessity, it was led inevitably to the conclusion that the question of whether or not the defendant acted from necessity was to be determined by the jury[6] on the basis of whether the defendant acted as a reasonable man under the circumstances.[7] At the conclusion of the trial the charge to the jury was to that effect. This test has generally been applied to cases of the destruction of property, but even here the justice of it has been questioned.[8] In criminal cases the defense of necessity, though called by various names, has always been governed by the same principles of law, which are those governing self-defense. It has been termed coercion,[9] duress,[10] fear,[11] compulsion.[12] By the great weight of authority in order for the defendant to avail himself of the defense, there must have been an impending danger, present, imminent and not to be averted.[13] So,

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[4] State of Arizona *v.* Wootton, *supra,* footnote 1, p. 100. Wharton, Criminal Law (11th ed. 1912) § 128.

[5] Hale *v.* Lawrence (1848) 21 N. J. L. 714, (conflagration); American Print Works *v.* Lawrence (1847) 21 N. J. L. 248, reversed *ibid.* p. 751 (same); Keller *v.* City of Corpus Christi (1879) 50 Tex. 614, (same); Conwell *v.* Emrie (1850) 2 Ind. 35, (same); Field *v.* City of Des Moines (1874) 39 Iowa 575, (same); Mayor, etc. *v.* Lord (N. Y. 1837) 17 Wend. 285, (same); Mayor, etc. *v.* Lord (N. Y. 1837) 18 Wend. 126, (same); United States *v.* Ashton (C. C. 1834) 24 Fed. Cas. No. 14,470, (crew refused to obey orders, demanding that the master put back to port on the ground that ship was unseaworthy); United States *v.* Borden (D. C. 1857) 24 Fed. Cas. No. 14,625, (mutiny because of expected harsh and cruel treatment). These two last cases may be explained on the ground that at sea a sailor has no one to whom he may appeal for relief against the master.

[6] The court cites Commonwealth *v.* Blodgett (1846) 53 Mass. 56, in support of this proposition; but it is to be noted that the court there merely decided it was more proper for the jury to decide the question of necessity than for the State of Rhode Island to determine it in advance.

[7] "One claiming the right to destroy buildings to prevent the spread of a conflagration must necessarily have that right determined by the conditions existing or appearing to a reasonable man to exist at the time of the destruction. . . ." State of Arizona *v.* Wootton, *supra,* footnote 1, p. 105.

[8] Roman Law held that when fire reaches a house and it is pulled down to save others, the person pulling it down was not responsible, yet, "Common opinion inclines more to equity . . . for it would be unreasonably hard that when I have saved my own concerns by destroying those of another man, the whole loss should be thrown on him, whilst the whole advantage lights on me." Pufendorf, *Law of Nature and Nations* (Carew's Trans. 1729) lib. 2, c. 6, 211. *Cf.* Hale *v.* Lawrence, *supra,* footnote 5. *Cf. contra,* Field *v.* City of Des Moines, *supra,* footnote 5.

[9] Henderson *v.* State (1909) 5 Ga. App. 495, 63 S. E. 535; Bain *v.* State (1890) 67 Miss. 557, 7 So. 408.

[10] McCoy *v.* State (1887) 78 Ga. 490, 3 S. E. 768; State *v.* Moretti (1912) 66 Wash. 537, 120 Pac. 102.

[11] People *v.* Martin (1910) 13 Cal. App. 96, 108 Pac. 1034.

[12] Arp *v.* State (1893) 97 Ala. 5, 12 So. 301.

[13] Bain *v.* State, *supra,* footnote 9; People *v.* Martin, *supra,* footnote 11;

where the defendant's life was threatened unless he accompany those intending to commit murder,[14] where the threats were a future injury,[15] where the defendant committed the crime in conformity with his promise to a threatening mob, but after he was a good distance away from its power,[16] the defendant was not excused.

Looking to some of the criminal cases in which necessity has been pleaded, we find statements laying down the law much the same as in cases of self-defense. This appears reasonable enough if we take into consideration the fact that the defendant, in such cases, is trying to show that he acted to preserve himself; and this in spite of whatever technical name his attorney may have given to the defense. In *United States* v. *Holmes*[17] the court charged the jury: "But the case does not become 'a case of necessity' unless all ordinary means of self preservation have been exhausted. The peril must be instant, overwhelming, leaving no alternative but to lose our own life, or to take the life of another person." The court went on to say that if the danger was obvious but a little remote, lots should have been cast. A stronger case of necessity than was presented in that case can hardly be imagined. The law of nature would seem to govern, and yet, in spite of the fact that there was no one to appeal to for safety, the court said that "the peril must be instant, overwhelming, leaving no alternative."[18]

It may be well to note that the defense of necessity has been regarded with suspicion, even as the court did in the principal case.[19] Because of such suspicion, the courts very often look to see what might have been done instead of what was done, in order to determine whether necessity existed.[20] The crime as laid in the information was taking the complainant from the Warren Ball Park into New Mexico. While the court admits that the taking to the ball

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McCoy *v.* State, *supra,* footnote 10; Pirkle *v.* State (1912) 11 Ga. App. 98, 74 S. E. 709; Henderson *v.* State, *supra,* footnote 9; see also Burton *v.* State (1907) 51 Tex. Crim. Rep. 196, 101 S. W. 226 (there must be immediate personal constraint); State *v.* Moretti, *supra,* footnote 10 (reasonable apprehension of instant death); Arp *v.* State, *supra,* footnote 12 (one cannot justify the taking of human life by pleading compulsion of another); United States *v.* Holmes (C. C. 1842) 26 Fed. Cas. No. 15,383, p. 366 ("The case does not become one of necessity unless all ordinary means of self-preservation have been exhausted.") *Contra,* Bryant *v.* Territory (1909) 12 Ariz. 165, 100 Pac. 455 (laying down the reasonable test rule).

[14] Arp *v.* State, *supra,* footnote 12.

[15] State *v.* Moretti, *supra,* footnote 10; People *v.* Martin, *supra,* footnote 11.

[16] Burton *v.* State, *supra,* footnote 13.

[17] *Supra,* footnote 13. The facts were that the defendant was a sailor from a shipwrecked vessel. He was one of a number of passengers and crew who had taken refuge in a long boat. After some time out, seeing no hope of rescue and realizing that the boat was sinking due to the overload, the defendant, among others, threw overboard some of the male passengers without drawing lots.

[18] Ibid., p. 366.

[19] Pattee, J., "As to the rule of necessity: It has been shown . . . that there is such a rule and in a case justifying its application the party acting by reason of necessity is excused from the consequences of what would otherwise be a criminal act. The cases are and must be rare and conditions exceptional in which such a rule may be invoked. . . . Naturally the first impression the mind entertains is that such a defense is rather a desperate attempt to escape the consequences of criminal conduct than a *bona fide* excuse for such conduct." State of Arizona *v.* Wootton, *supra,* footnote 1, p. 103. The defense of necessity we do not believe to be generally an afterthought to escape consequences, but it seems to be so in this case and in many cases which arose under the Non-Intercourse and Embargo Acts. See Brig Struggle *v.* United States (13 U. S. 1815) 9 Cranch. 71; Brig Wells *v.* United States (11 U. S. 1812) 7 Cranch. 22.

park was just as much a kidnapping as the taking to New Mexico, the crime must be proved as charged. At the time they were taken from the ball park, none of the dangers contemplated by the defendant seem to have existed. The great bulk of the conspirators were assembled at the park, unarmed and under heavy guard. If the defendant and the other deputy sheriffs were acting merely from the motive of preventing a catastrophe, it seems that it would have been more reasonable to have kept the conspirators under guard and to have searched their homes and other places for the fire-arms and explosives which it was contended they possessed. If the object of the wholesale deportation was merely to prevent the catastrophe, it seems evident that unless the explosives were removed the danger still existed. If the object was to show other conspirators that they would be dealt with summarily, let us suppose that instead of being kidnapped, a few of the strikers had been lynched by the deputies. The reasoning of the court would apply with equal force to such a case, and yet it seems quite evident that the court would have ruled out the defense because the defendant was not in instant fear of great bodily harm.[21]

In *Ex parte Milligan*[22] Mr. Justice Davis said: "No doctrine involving more pernicious consequences was ever invented by the wit of man than that any of its (the Constitution of the United States) provisions can be suspended during any of the great exigencies of the Government. *Such a doctrine leads directly to anarchy or despotism,* but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the power granted to it, which are necessary to preserve its existence; as has been happily proved by the result of the great effort to throw off its just authority."[23] The court said further: "If it was dangerous . . . to leave Milligan unrestrained of his liberty . . . the law said arrest him, confine him closely . . . present his case to the grand jury . . . and if indicted try him according to the course of the common law."[24]

The court in the above case used strong language to uphold the rights of a man whose conduct it despised. Yet the court in the principal case waved aside *Ex parte Milligan* as deciding merely that the administrative part of our government could not substitute one form of tribunal for a regularly constituted tribunal. But we venture to ask, are the results of substituting one tribunal for another one, more pernicious than allowing the mob to substitute its will for all properly constituted authority? It may be that the court was influenced by numbers though it did not say so. Possibly the fact that the conspirators were a minority and the defendant one of the majority led the court to feel, if not express, that evidence favorable to the defendant should have been admitted. It is submitted, however, that ours is a government which

[20] Brig Wells *v.* United States, supra, footnote 19.

[21] Bleckley, C. J., "True it is that perjury cannot be committed without willfully, as knowingly, absolutely and falsely, swearing (Code § 4460); but this does not imply that more moral freedom is required for the commission of perjury, than in the commission of murder or any other crime. No less degree of fear will excuse perjury than other felonies." McCoy *v.* State, *supra,* footnote 10, p. 769.

[22] (71 U. S. 1866) 4 Wall. 2. During Civil War, Milligan, a citizen of a loyal state, was arrested by the military authorities, tried and sentenced by them to be hanged on the following charges: (1) conspiracy against the United States; (2) giving aid and comfort to the enemy; (3) inciting to insurrection; (4) disloyal practices; (5) violation of the laws of war. The case came to the Supreme Court on a writ of *habeas corpus,* the government contending that the trial by military tribunal was justified as an act of necessity.

[23] *Ibid.,* p. 121.

[24] *Ibid.,* p. 122.

seeks to protect the minority from sudden, ill-considered acts of the majority. We would call attention to Mr. Justice Baldwin's remark in charging the jury in *United States* v. *Holmes.*[25] He said: "It is one thing to give a favorable interpretation to evidence in order to mitigate an offense. It is a different thing, when we are asked, not to extenuate, but to justify, the act." It may be that the defendant in the principal case, if convicted, should have been dealt with leniently, but only evidence which tended to prove that the danger was instant, overwhelming and that all other means had been exhausted, should have been admitted. At the conclusion of the trial the charge should have been to the effect that the defendant was guilty unless the danger outlined above existed, and that he was not excused merely because he acted as a reasonable man.

THE VALIDITY OF CONTRACTS INVOLVING THE BREACH OF CONTRACTS WITH THIRD PERSONS.—In a standard treatise,[1] the author lays down the following rule: "Any contract, the object or necessary tendency of which is to place one owing duties to third persons in a position where he is under obligations to two parties having antagonistic interests, is void, even though in fact it have no bad effect."[2] According to this passage, where X, who has contracted to sell land or goods to Y, contracts to sell the same land or goods to A, the second contract is void. To test the accuracy of the rule, it is proposed to consider three of the situations it suggests: (1) A enters into the second contract in good faith and without knowledge of the first; (2) A, having knowledge of the first contract, actively induces X to enter into the second; (3) A enters into the second contract with mere passive knowledge of the first.

(1) Where A contracts to purchase from X in good faith and without knowledge of X's contract with Y, no court would hold the second contract void. If land or a unique chattel were the subject-matter of the contracts, Y, being first in point of time, would get specific performance;[3] A would get damages.[4] Yet X has entered into a contract wholly inconsistent with the performance of his duty to Y.

(2) Where A, with knowledge of a prior contract between X and Y, induces X to enter into a contract the performance of which involves the breaking of the first contract, the situation is entirely different. Although there are a myriad of conflicting decisions and *dicta,* the weight of authority perhaps supports the general proposition that one who intentionally induces another to break his contract with a third person is liable in tort.[5] In several jurisdictions, there is no tort liability unless the offending party was guilty of fraud or coercion.[6] In some of these jurisdictions, however, an action will lie in the absence of fraud where the defendant has interfered with the relations between master and servant.[7] Other courts have suggested that no

[25] *Supra,* footnote 13, p. 366.

[1] Greenhood, *Public Policy* (1886) 292.

[2] Quoted with approval in Bolton *v.* Amsler (1905) 95 N. Y. Supp. 481.

[3] Johnson *v.* Hayward (1905) 74 Neb. 157, 103 N. W. 1058.

[4] Maguire *v.* Heraty (1894) 163 Pa. St. 391, 30 Atl. 151.

[5] Lumley *v.* Gye (1853) 2 El. & Bl. 216; Quinn *v.* Leathem [1901] A. C. 495; Bowen *v.* Speer (Tex. 1914) 166 S. W. 1183; Wheeler-Stenzel Co. *v.* American W. G. Co. (1909) 202 Mass. 471, 89 N. E. 28. The defendant may escape liability by justifying his conduct, as in Legris *v.* Marcotte (1906) 129 Ill. App. 67, where the defendant acted in good faith in pursuance of a social duty.

[6] Swain *v.* Johnson (1909) 151 N. C. 93, 65 S. E. 619; Ashley *v.* Dixon (1872) 48 N. Y. 430; Land & Gravel Co. *v.* Commission Co. (1897) 138 Mo. 439, 40 S. W. 93; Chambers *v.* Baldwin (1891) 91 Ky. 121, 15 S. W. 57.

[7] Posner *v.* Jackson (1918) 223 N. Y. 325, 119 N. E. 573; see Boyson *v.*